

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24/03/2004

CORAM

THE HON'BLE MR.JUSTICE M. CHOCKALINGAM

SECOND APPEAL NO.506 OF 1993

1. Kanna Pillai (deceased)
2. Sakunthala
3. Parasuraman
4. Kumari
5. Valli
(Appellants 2 to 5 brought
on record as LRs of the
deceased sole appellant vide
as per order of Court
dt.10.4.02 made in CMP.3910/02) .. Appellants

-Vs-

1. Oyamalli @ Mallika Ammal
2. Sri Raman
3. Thirumal
4. Veerappan (died)
5. Venkatesan
6. Rajam
7. Minor Ve.Hemalatha
rep. by her mother Rajam
6th respondent
(Respondents 6 and 7 are brought
on record as LRs of deceased
4th respondent and the 6th
respondent guardian vide
CMP Nos.3957 & 3958/94
dt.27.7.2000) .. Respondents

This second appeal is preferred under Section 100 of CPC against the judgment and decree passed in AS No.4 of 1990 on the file of the learned Subordinate Judge, Vilupuram dated 2.2.1993 confirming the judgment and decree of the learned Additional District Munsif, Villupuram made in OS No.415/87 dated 5.9.1989.

:JUDGMENT

What is challenged herein is the judgment of the learned Subordinate Judge, Villupuram made in AS No.4 of 1990, wherein the judgment of the trial court in a suit for declaration and for consequential permanent injunction was

affirmed.

2. The plaintiff sought the relief in respect of a piece of land, measuring 1-1/2 cents along with a tamarind tree shown as B schedule to the plaint, a part of 6 cents situated in S.No.622/3 which is described as A schedule. According to the plaintiff, the property measuring 6 cents originally belonged to his father one Govindasamy Pillai and his three brothers, and thus, each was entitled to 1-1/2 cents. Originally patta was granted. The old patta number is 319 and the new patta number is 780. The defendants have no right or interest over the suit property. While so, the defendants were adumbrating that out of 6 cents in S.No.622/3, the husband of the first defendant and the father of the defendants 2 to 5 one Thiruvenkatam was entitled to 4 cents and the rest 2 cents was belonged to the plaintiff and their pankalis. When the plaintiff made an attempt to take the fruits in the tamarind tree, it was being objected to by the defendants, and there arose a necessity for the plaintiff to file the suit.

3. The suit was resisted by the defendants-inter-alia stating that the claim made by the plaintiff was false and the suit A schedule property measuring 6 cents never belonged to the plaintiff's family; that neither B schedule nor A schedule has been in possession of the plaintiff or his family members, but the property has also been in the possession of the defendants and prior to them with Thiruvenkadam, the husband of the first defendant; that the property actually lies within patta No.320 and not 319 as contended by the plaintiff; that the defendants have been paying kist; that originally, a suit was filed in OS No.562 of 1980 and an appeal was preferred in AS No.148 of 1982, wherein it has been found that the plaintiff was not entitled to, but the same was suppressed in the suit, and hence, the suit was to be dismissed.

4. The trial court framed necessary issues, tried the suit and dismissed the same. Aggrieved, the plaintiff took it on appeal, which was also met the same fate. Hence, this second appeal, at the instance of the plaintiff, aggrieved over the judgment of courts below.

5. At the time of admission, the following substantial question of law was formulated by this Court for consideration:

"Whether the dismissal of the suit in its entirety even though a finding is given in favour of the appellant in respect of two cents of suit land is sustainable?"

6. Heard the learned counsel for the appellants and also the respondents on those contentions.

7. From the very reading of the plaint, it could be seen that the plaintiff has sought the relief of declaration in respect of 1-1/2 cents out of 6 cents situated in S.No.622/3 and also a tamarind tree situated in that 1-1/2 cents. The said 1-1/2 cents and the tamarind tree are shown in B schedule and the total extent of 6 cents was shown in A schedule. The specific case of the plaintiff was that the entire extent of 6 cents is originally belonged to his father one Govindasamy Pillai and his three brothers, and thus, all the four branches were entitled to 6 cents and each was entitled to 1-1/2 cents. It remains to be stated that nowhere in the plaint, any partition or separate possession and enjoyment of the property has been pleaded, but the plaintiff averred in the plaint that the entire property was in possession of the plaintiff and he has been paying kist for the same. It is true that it is not a suit for partition, but the plaintiff has sought for declaration in respect of 1-1/2 cents and a tamarind tree therein, which

is shown in B schedule. Needless to say that the plaintiff comes forward to state that there are other co-sharers, and hence, declaration as sought for by the plaintiff in the absence of others cannot be granted at all. As pointed out above, it is not the case of the plaintiff that the property was divided and the plaintiff was in possession and enjoyment of the same. The defendants have come forward to state that out of 6 cents, the first defendant was entitled to 4 cents and the rest belonged to the family of the plaintiff. The adding circumstance is that both the courts below have pointed out that the plaintiff has failed to prove the fact, by seeking an appointment of an Advocate Commissioner, that there is a tam arind tree in B schedule property. The Court is able to see legal impediment, though not mentioned by both the courts below, that such a declaration in respect of a part of the property, namely, 1-1/2 cents and a tamarind tree, in the absence of the other cosharers, whom according to the plaintiff were also entitled to the property of 6 cents, cannot be granted, and thus, it suffers with non adding of necessary party to the suit. Apart from that, under the stated circumstances, this Court is of the opinion that the merit of the rival submissions in respect of their cases need not be now gone into and what would be better is to make a dismissal of the appeal by giving liberty to the plaintiff to file a fresh suit, adding all the necessary parties and seeking for necessary relief as required in law. It was a suit filed by the plaintiff seeking for declaration in respect of 1-1/2 cents and a tamarind tree. But, both the courts below, in the absence of all the necessary parties, have gone into an extent of adjudicating the right of the defendants stating that they are entitled to 4 cents out of total extent of 6 cents, which finding has got to be necessarily set aside for the simple reason that in the absence of all the necessary parties, such adjudication cannot also be done. Hence, that finding is set aside. Exercising liberty, if the plaintiff has filed a fresh suit adding all the necessary parties, the defendants are at liberty to adduce evidence necessary.

8. In the result, this second appeal is dismissed, leaving the parties to bear their costs.

Index : Yes

Internet : Yes

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To

1. The Subordinate Judge, Villupuram
2. The Additional District Munsif, Villupuram
3. The Record Keeper, VR Section,
High Court, Madras

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